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JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 479

WILMA URCH COLVILLE, Executrix of the Last Will and Testament of Charles J. Colville, Deceased,

Petitioner,

vs.

ISABELLE C. KOCH, Individually and as Administratrix of the Estate of Edward Cebrian, Deceased,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals entered on May 24, 1956. The Court of Appeals affirmed a judgment of the United States District Court for the Northern District of California, Southern Division, in which it was

ordered that your petitioner should take nothing by her complaint.

CITATIONS TO OPINIONS BELOW

The memorandum opinion of the District Court (Appendix, p. 1) is not reported. The opinion of the Court of Appeals (Appendix, pp. 10-18) is reported at 234 F.2d 157.

JURISDICTION

Jurisdiction of the District Court was based on diversity of citizenship and amount in controversy under United States Code, Title 28, Section 1332. Jurisdiction of the Court of Appeals was based on United States Code, Title 28, Section 1291. Jurisdiction of this Court is invoked under United States Code, Title 28, Section 1254(1).

The judgment of the Court of Appeals was made and entered on May 24, 1956 (Appendix, p. 19). The normal time to apply for the writ of certiorari expired on August 22, 1956, as provided in United States Code, Title 28, Section 2101(c). By order of the Honorable Harold H. Burton, Associate Justice, petitioner was given until October 5, 1956 in which to file this petition.

QUESTIONS PRESENTED

1. Where the place of residence is a jurisdictional requirement for the proper probate of an estate, and where the trial court made no findings as to the place of residence, is it not improper for the reviewing court to determine the place of residence *de novo* without application of the law of the state in which the action arose?

2. Did not the trial court err as a matter of law in deciding that intent to defraud is an essential element for equitable relief from an erroneous judgment?

3. Where a trial court, in deciding that actionable fraud requires intent to defraud, erred as a matter of law, should not a reviewing court reverse the judgment of the trial court with instructions to determine the other issues rather than to affirm the judgment of the trial court upon considerations (e. g. residence, title, and statutes of limitation) not determined by the trial court?

4. Where the trial court refused to pass upon certain affirmative defenses and where the defenses were neither briefed nor argued on review, is it not an injustice for a reviewing court to decide a case in part upon such considerations?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28, § 1652:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. * * *"

California Probate Code, Section 301:

> "* * * letters * * * of administration (must be) granted and administration of estates of decedents (must be) had, in the superior court: (1) Of the county of which decedent was a resident at the time of his death, wherever he may have died; * * *"

California Government Code, Section 244:

> "In determining the place of residence the following rules are to be observed: (a) It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose. (b) There can only be one residence. (c) A residence can not be lost until another is

gained. * * * (g) The residence can be changed only by the union of act and intent."

California Civil Code, Section 2224:

"One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

STATEMENT OF THE CASE

This case involves a promissory note, executed in California (Finding 5, Appendix, p. 2). Petitioner is the present holder of the note (Plaintiff's exhibit 1, R. 35-36, 47). Respondent is the personal representative of the maker, now deceased, of the note (Finding 13, Appendix, p. 5).

The District Court found that Edward Cebrian, the maker, owed the amount of said note, plus interest, at the time of his death (Finding 10, Appendix, p. 4).

The Court of Appeals found, in its opinion, that the original plaintiff (for whom petitioner was later substituted) brought suit in the United States District Court on the note against the personal representative of the deceased maker of the note. Plaintiff claimed that Edward Cebrian, the maker of the note, was a resident of Los Angeles County at the date of his death, that respondent fraudulently probated the decedent's estate in the City and County of San Francisco rather than in Los Angeles County and that as a consequence plaintiff was fraudulently deprived of the right to file a claim against the estate for the recovery of the amount due under the note (Opinion, Appendix, pp. 10-11).

The Court of Appeals found, but the District Court did not find, that the decedent at the time of his death was a

resident of the City and County of San Francisco. As a consequence of its finding, the Court of Appeals concluded that your petitioner failed to establish fraud (Opinion, Appendix, pp. 14-16).

The District Court made no finding as to the place where the decedent was a resident at the date of his death, but the District Court found in respondent's favor because "* * * defendant * * * committed no fraud extrinsic in character with respect to the probate proceedings * * *" (Appendix, p. 1), and "* * * no act of appellee in connection with the probate of the estate of Edward Cebrian was done with intent to deceive, defraud, delay, or mislead creditors. * * *" (Opinion, Appendix, p. 13).

Moreover, as the Court of Appeals pointed out in its decision, the District Court made no findings of fact or conclusions of law upon any other issues raised by the respondent in defense of the suit, including those based upon statutes of limitations and upon petitioner's alleged failure to establish title to the promissory note in suit (Opinion, Appendix, p. 13). The Court of Appeals on the other hand devoted much of its opinion to these affirmative defenses (Opinion, Appendix, pp. 16-18). Petitioner shows, this petition, p. 15, that these defenses were neither briefed nor argued before the Court of Appeals.

Since the two courts relied upon separate bases, petitioner submits that the rule that this Court will not review concurrent findings of fact is inapplicable.

The evidence on the question of place of residence is without conflict. The documentary evidence and the admissions of the parties disclose:

a. Edward Cebrian, petitioner admits, was established as a resident of the City and County of San Francisco from his birth until late 1934 or early 1935;

b. In 1935 Edward Cebrian moved to Rancho Cuyama, an old family ranch, near Santa Barbara, then under foreclosure and he lived there until 1938 under a lease with an option to purchase (R. 39, 40, 58, 97, and 98);

c. While Edward Cebrian was living at Rancho Cuyama, his father died in 1935 and devised the old family homestead in San Francisco to Edward's brother Ralph (R. 40, 53);

d. Edward Cebrian on July 13, 1936 became a registered voter in Santa Barbara County (R. 38, Plaintiff's Exhibit 6)—there is no evidence that this change in residence from San Francisco to Santa Barbara County was not voluntary;

e. Ralph Cebrian on May 27, 1937 transferred the family homestead to Louis De L. Cebrian (R. 41, Plaintiff's Exhibit 9);

f. In 1938, Edward Cebrian lost his rights in Rancho Cuyama (R. 59, 98)—Respondent admitted that this was after Ralph had disposed of the family homestead (R. 41);

g. In the interim, between 1935 and 1938, Edward made occasional "business trips" to San Francisco, where he stayed at the Palace Hotel (R. 97-98);

h. In 1938, during a visit to San Francisco, Edward met his brother Ralph on the street in San Francisco, Edward told Ralph that he wanted to remain in San Francisco but that respondent wanted him to move to Los Angeles (R. 55-56)—the record discloses no act at this time changing his residence from Cuyama to San Francisco;

i. Edward Cebrian admittedly left the Rancho Cuyama for Los Angeles (R. 41, 98);

j. In the fall of 1938, Edward Cebrian admittedly established his "first residence down there" (R. 100);

k. On October 1, 1939, Edward Cebrian moved into another apartment in Los Angeles and by stipulated testimony he told his landlady that it was his intention to become a "permanent" tenant and to make the apartment his "permanent home", he moved in with all of his personal belongings, and he stayed there until he died (R. 42, Plaintiff's Exhibit 10);

l. On March 20, 1940, Edward Cebrian under oath stated in his affidavit of registration that he was a "resident" of Los Angeles and that he removed from Cuyama (Plaintiff's Exhibit 11, R. 42-43);

m. Edward Cebrian thereafter voted in Los Angeles at the general elections in 1940 and 1942 (Plaintiff's Exhibit 11, R. 42);

n. Edward was never seen in San Francisco since 1938 (R. 55) and he did not even write to his brother Ralph (R. 56) although he did write to respondent (R. 101);

o. It is admitted that while in Los Angeles, Edward Cebrian stated to respondent and her husband that "he wanted *to return to San Francisco and make his residence here*" and "he wanted *to make San Francisco his home*," (R. 102, 104, emphasis added) thereby confirming his status that his residence was not then in San Francisco;

p. On June 6, 1944, Edward Cebrian died in Los Angeles;

q. Repondent, as informant to the death certificate of the decedent, admitted shortly after his death that "the usual residence" of the decedent was in Los Angeles County (Plaintiff's Exhibit 12, R. 43);

r. Respondent filed a verified petition for probate of the estate of Edward Cebrian in Los Angeles County

proclaiming under oath that Edward Cebrian was "a resident of the County of Los Angeles, State of California, at the time of his death" (Plantiff's Exhibit 13, R. 43).

The foregoing facts are incontrovertible upon the record. Petitioner urges that they prove that Edward Cebrian was a resident of Los Angeles at the date of his death. Any other conclusion of necessity would mean:

a. that Edward lied to his landlady when he told her of his intention to make the apartment a permanent home;

b. that Edward perjured himself when he sought voting registration in Santa Barbara and later in Los Angeles County;

c. that Edward committed misdemeanors when he voted at the general elections in Los Angeles;

d. that Edward spoke without meaning when he expressed the wish "to make" San Francisco his residence;

e. that respondent's husband was in error when he spoke of Edward's "first residence" in Los Angeles;

f. that respondent committed a misdemeanor when she was informant on the death certificate (Health and Safety Code, Section 10,675);

g. that respondent perjured herself when she verified the Los Angeles petition (Penal Code, Section 125).

We cannot conceive that errors could have been made at so many different times by so many different people concerning the place of residence of Edward, particularly when many of them were by the decedent himself and many of them would have constituted violations of law.

The Court of Appeals, without citation of any authority, cast the evidence outlined above aside, stating, Appendix, p. 16:

> "* * * Evidence of his registration and voting in Los Angeles and statements made while there are of little importance compared to the evidence upon which the Superior Court in San Francisco based its finding that he was a resident of the City and County of San Francisco at the time of his death; * * *"

Respondent admitted that the evidence upon which the Superior Court based its finding is as follows (R. 48-49):

> "Q. * * * What did you tell Judge Fitzpatrick about the proceedings you had filed down in Los Angeles?
>
> A. I told him I had filed them in Los Angeles so that the court would decide which was his residence.
>
> Q. Now, what were all of the facts that you told Judge Fitzpatrick to help him reach a decision?
>
> A. That he was born here in San Francisco; he went to school here in San Francisco, and then he went abroad also to [26] school, but his first schooling he started here. When he came back to America he went to Berkeley to the University, and his family home was here; he always wanted to live here; he would take trips as we all did, and he would always come back home, and that this was his home. He was living temporarily in Los Angeles, because he was able to find a job in Los Angeles, whereas here he had not been able to find one. So I left it to the court to decide.
>
> Q. And that's the sum and substance of what you told Judge Fitzpatrick?
>
> A. That's about it.
>
> Q. Can you think of anything else that you told him?
>
> A. Not at this moment I don't."

It is self-evident that respondent did not tell Judge Fitzpatrick all of the facts and that the facts which she did tell him presented a distorted picture upon which to determine residence.

REASONS FOR GRANTING THE WRIT

1. In determining the place of residence of Edward Cebrian, the Court of Appeals decided an important question of state law in a way in conflict with applicable state law.

The refusal of the Court of Appeals to give any weight to the evidence of Edward Cebrian's registration and voting in Los Angeles and to the statements made by him while there is in direct conflict with controlling California decisions.

For example, in *Bullis v. Staniford* (1918), 178 Cal. 40, the Court discussed the place of residence in proceedings to set aside a fraudulently declared homestead. Staniford lived at Fresno until 1912. In 1912 he went to Los Angeles; he registered as a voter in Los Angeles; and he voted at all regular elections in that city. The Court pointed out that his registration was supported by affidavits solemnly alleging that his residence was in Los Angeles. He also testified in a court action that his residence was in that city. The Court disposed of contrary evidence similar to that in the case at bar as follows, p. 46:

> "* * * At most his testimony amounts to proof of a floating intention some day to return to Fresno to live, and this as against the solemn, undisputed evidence of facts establishing his residence in Los Angeles is negligible."

And in *Estate of Brady* (1918), 177 Cal. 537, states, p. 540:

> "* * * The presumption that a person is innocent of crime is very strong, and it is not to be assumed, in the absence of substantial evidence of the fact, that Brady

committed perjury in making his affidavits of registration. The fact that his original place of residence was San Francisco is of no force to raise the presumption that it continued to be there after the year 1914, as against the positive evidence that in that year he deliberately changed it to the city of Ross. * * *"

Other cases in accord include:

Taff v. Goodman (1940), 41 Cal. App. 2d 771, 775;
Estate of Weed (1898), 120 Cal. 634; and
Estate of Margaret Austin (1879), Myrick, 237.

Under the Statute also, Government Code, Section 244, quoted this petition, p. 3, it is clear that Edward Cebrian's residence was never in San Francisco after he established residence at Rancho Cuyama in 1935 or 1936.

The rule in California appears to be sound, but, even if it were not, the Court of Appeals should have applied the California law. In *Krauss v. Greenbarg* (C.C.A. 3, 1943), 137 F.2d 569, the Court said p. 571:

"* * * our duty is to apply state law as we find it in the state decisions irrespective of what we may regard as its merits. * * *"

Petitioner urges that the failure to apply the state law of California on the contested issue of place of residence is a grave injustice which should be rectified by the grant of the writ. As an example of the use of the writ where the court made an independent determination of the law without citing or discussing state decisions or statutes, petitioner refers to *Klaxon Co. v. Stentor Co.* (1941), 313 U.S. 487, in which the Court said, p. 496:

"* * * Application of the New York statute apparently followed from the court's independent determination of the 'better view' without regard to Delaware law, for no Delaware decision or statute was cited or discussed."

Analogous authority warranting the grant of the writ is *Pecheur Co. v. Nat. Candy Co.* (1941), 314 U.S. 603, decree vacated and cause remanded (1942), 315 U.S. 666.

2. In the event that this Court agrees with petitioner that the question of residence was improperly decided, then the decision of the Court of Appeals and the District Court may be in direct conflict with *Markham v. Allen* (1946), 326 U.S. 490, and *Arrowsmith v. Gleason* (1889), 129 U.S. 86.

In the event that Edward Cebrian was a resident of the County of Los Angeles at the date of his death, as petitioner contends, it follows as the day follows the night that the prosecution of probate proceedings in the City and County of San Francisco instead of in the County of Los Angeles was a violation of the jurisdictional provision of the California Probate Code, § 301, quoted above, p. 3.

Petitioner concedes that, upon the allegations of the complaint in this case, the District Court had no authority to set aside the decree of the Superior Court for the City and County of San Francisco in appointing the respondent as the administratrix of the decedent's estate. Nonetheless, assuming petitioner's factual premise to be correct, petitioner submits that the District Court and the Court of Appeals both had the power and the duty to charge the respondent as a constructive trustee of the assets of the estate of the decedent for the creditors.

In *Markham*, the Court said, 326 U.S. 490, p. 494:

> "* * * it has been established by a long series of decisions of this Court that federal courts of equity have jurisdiction to entertain suits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate 'to establish their claims' so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court. * * *"

In *Arrowsmith*, the Court said, 129 U.S. 86, p. 101:

> "These principles control the present case, which, although involving rights arising under judicial proceedings in another jurisdiction, is an original, independent suit for equitable relief between the parties; such relief being grounded upon a new state of facts, disclosing not only imposition upon a court of justice in procuring from it authority to sell an infant's lands when there was no necessity therefor, but actual fraud in the exercise, from time to time, of the authority so obtained. As this case is within the equity jurisdiction of the Circuit Court, as defined by the Constitution and laws of the United States, that court may, by its decree, lay hold of the parties, and compel them to do what according to the principles of equity they ought to do, thereby securing and establishing the rights of which the plaintiff is alleged to have been deprived by fraud and collusion."

The rule of *Arrowsmith* has been adopted in *Curtis v. Schell* (1900), 129 Cal. 208, at p. 218, and in *Campbell-Kawannanakoa v. Campbell* (1907), 152 Cal. 201, at p. 210.

The equitable doctrine applied in *Markham* and *Arrowsmith* is part and parcel of the organic law of the State of California, as provided in the California Civil Code, § 2224, quoted above, p. 4. It is also applied with consistency and regularity in almost any kind of a case in which any kind of a litigant has obtained the benefits of any kind of a judgment to which he is not in equity entitled. A chart of California cases sustaining this categorical statement follows the appendix to this petition.

Petitioner submits that the failure of the District Court and the Court of Appeals to apply this equitable doctrine has resulted in unjust enrichment to the respondent, the District Court having found as a fact that Edward Cebrian owed the amount of the note on the date of his death (Find-

ing 10, Appendix, p. 4) and it being admitted that respondent shared in the estate as an heir and creditor (R. 113-115).

Petitioner further submits that the refusal of the Court to follow general principles of equity in this regard should be rectified by the grant of certiorari as was the case by analogy in *Markham v. Allen* (1946), 326 U.S. 490.

3. Insofar as the decision of the Court of Appeals might be thought to have an independent basis for support because of the determination of the District Court that respondent had no "intent to deceive, defraud, delay, or mislead creditors," the decisions below are in conflict with state law on this important question of state law. In *Cardozo v. Bank of America* (1953), 116 C.A. 2d 833, the Court held that a party is entitled to equitable relief on the basis of constructive fraud even where there is an absence of intent. At page 839, the Court said:

> "* * * The fact that she did not intend to defraud him is not important. He was just as defrauded as if she had intended to defraud him. * * *"

4. With respect to the issues decided by the Court of Appeals in the last three full paragraphs of the opinion (Appendix, pp. 16-18), the District Court made no finding of fact.

We note specifically that the District Court found, Conclusion VI, Appendix 9:

> "The Court, having disposed of the case in favor of defendant by express findings of fact and conclusions of law on the issue of fraud, makes no findings of fact or conclusions of law on the issues as to the interpretation of the note in suit, the questions of conflicts of laws or the other issues raised by defendant's special defenses based upon laches and various statutes of limitation of the States of California and Kentucky."

The briefs filed with the Clerk show that the issues were not even briefed in the Court of Appeals. Respondent noted her points on the issues not in her brief or argument but in a 37-page appendix annexed to a 72-page brief. Appellant's Reply Brief, on file with the Clerk of this Court, makes the following comment, p. 1:

> "Preliminarily, plaintiff points out that the Appellee's Reply Brief, pages 2-3, refers to several 'special defenses' upon which the District Court made no ruling. Defendant's argument on the special defenses is not made a part of the reply brief itself, but is included in a 37 page appendix following a 72 page brief. The rules do not appear to encompass an argument contained in an appendix.
>
> "Plaintiff submits, therefore, that the special defenses should be decided in the first instance by the District Court on remand if plaintiff is successful on the main issues. It is so suggested in Appellant's Opening Brief, page 61. If, however, this Court desires to decide the special defenses, plaintiff asks leave to file a reply brief directed to the argument in the appendix."

Petitioner notes that the Rules of the Court of Appeals for the Ninth Circuit do not provide for any argument to be included in an appendix. Petitioner also notes that the rules preclude a brief in excess of 80 pages "except after leave granted." Rule 18, Section 2(e).

In *Petitions of Rudder* (C.C.A. 2, 1947), 159 F.2d 695, the Court, in speaking of material which should have been printed in the record rather than in the brief, said, page 696:

> "* * * Since the material printed in the appendices has not been incorporated into the records on appeal, we shall not consider it in determining the merits of the appeals."

Counsel for petitioner has understood the rule to be that matters open to review are limited to the presentation of matters "as stated in the brief" (*Anderson v. Federal Cartridge Corporation*, C.C.A. 8, 1946, 156 F.2d 681, 683) and that the rules on briefs are construed so as to require strict compliance thereto (*Thys Company v. Anglo California National Bank*, C. A. 9, 1955, 219 F.2d 131, 132-133). Cf. *Clark Blade & Razor Co. v. Gillette Safety Razor Co.*, C.C.A. 3, 1936, 82 F.2d 707, 708, and *Ind. Wireless Co. v. Radio Corp.* (1926), 270 U.S. 84, 86.

Petitioner submits that in basing a decision, even in part, on matters neither briefed nor argued, the decision has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

Petitioner submits that her objection to this procedure is a meritorious one. In the *first* place, the Court of Appeals criticized her husband's acquisition of the note in question. If this matter had been briefed and argued, petitioner would have been able to call the attention of the Court of Appeals to the fact that the note was payable to John S. Barbee (Finding 5, Appendix, pp. 2-3); that John S. Barbee endorsed the note in blank (Finding 6, Appendix, p. 3); that John S. Barbee delivered the note to Van Meter-Terrell Feed Company (Finding 6, Appendix, p. 3); that the note in turn had been endorsed to Mr. Van Meter (Defendant's Exhibit A, p. 14); that First National Bank & Trust Company of Lexington, Kentucky, the executor and trustee of the estate of Baylor Van Meter, not only delivered the note to Mr. Colville, but also executed an assignment of the note to Mr. Colville (Findings 7 and 8, Appendix, pp. 3-4, Plaintiff's Exhibits 17 and 17-A); and that the petitioner produced the note so endorsed in blank at the trial of the case (R. 35-

37, 47). Petitioner also would have been able to show that Mr. Colville paid the First National Bank & Trust Company the sum of $500 in cash and agreed in addition to pay the Bank "50 percent of the net amount" collected by him in excess of $500 (Plaintiff's Exhibit 17-A, R. 44). As a consequence, the estate of Baylor Van Meter, the former owner of the note, is the beneficiary of 50% of the recovery.

Petitioner thus would have been able to show to the Court that the situation was quite unlike *Cockerell v. Title Ins. & Trust Co.*, 42 C.2d 284, 267 P.2d 16, in which the note in suit was made payable to "Crestmore Co., a Limited Partnership," and in which the note was specially endorsed "The Crestmore Co. P. H. Wierman."

In the *second* place, the Court of Appeals, without the benefit of argument, found that the appellant's suit was barred by the statute of limitations "unless it contained a waiver of the statute of limitations. There was no such waiver in the note in suit" (Appendix, p. 18). If this matter had been briefed and argued and if it were before the Court for decision, petitioner would have been able to show to the Court of Appeals that the note contained the following language:

> "* * * The makers and endorsers of this note and all parties hereto waive * * * diligence in bringing suit against any and all parties hereto, including makers and endorsers, and all defenses to the payment thereof, * * *" (Finding 5, Appendix 3).

Petitioner then also would have been able to show that under the law of the State of California, where the note was made, that the quoted language constituted a waiver of the statutes of limitations under cases such as *State Loan Etc. Co. v. Cochran* (1900), 130 Cal. 245; *Atlas Finance Corp. v. Kenny* (1945), 68 C.A. 2d 504; *Brownrigg v. DeFrees*

(1925), 196 Cal. 534; *McGee v. Jones* (1926), 79 Cal. App. 403; *Hammell v. Atkinson* (1926), 79 Cal. App. 708; and *Dexter v. Pierson* (1931), 214 Cal. 247.

Under the circumstances, petitioner submits that a grave injustice was committed when the Court of Appeals ruled *sua sponte* and without the benefit of briefing and argument upon these issues. Petitioner submits that a case should not be decided even in part upon the basis of an argument slipped into the case in an appendix to a brief particularly when the appendix is unwarranted by the rules of court and is unauthorized by court order.

CONCLUSION

Petitioner prays that the writ of certiorari issue.

Respectfully submitted,

CARL HOPPE
Attorney for Petitioner

(Appendix Follows)

Appendix

[Title of District Court and Cause.]

ORDER FOR JUDGMENT IN FAVOR OF DEFENDANT

This matter having been tried, briefed and submitted for decision,

The Court finds: That defendant-executrix, Isabelle C. Koch, committed no fraud extrinsic in character with respect to the probate proceedings involving the late Edward Cebrian. That there is no basis in law or in fact for directing the establishment of a constructive trust against said defendant and in favor of plaintiff, Wilma Urch Colville.

In view of the Court's specific finding on the issue of fraud, there is no occasion to pass upon the applicability of the statute of limitations or the defense of laches.

Accordingly, It is Ordered that judgment be entered in favor of defendant upon preparation of findings of fact and conclusions of law. Each side shall bear its own costs.

Dated: November 9, 1954.

/s/ George B. Harris,
United States District Judge.

[Endorsed]: Filed November 10, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial on the 9th day of March, 1954, and continuing to and including the 11th day of March, 1954, before the Court, Honorable George B.

Harris, United States District Judge, presiding, jury having been duly waived by the parties, Carl Hoppe, Esq., and Charles E. Townsend, Jr., Esq., appearing as attorneys for plaintiff, and Charles D. Sooy, Esq., appearing as attorney for defendant, and from the evidence introduced the Court finds the facts, as follows, to wit:

1. That Charles J. Colville, the original plaintiff herein, was at all times prior to his death a citizen of the Dominion of Canada, and that plaintiff by substitution, Wilma Urch Colville, is the widow, and executrix of the estate of Charles J. Colville, deceased, the original plaintiff herein;

2. That defendant is a citizen of the State of California;

3. That the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00);

4. That on November 15, 1932, one Edward Cebrian, now deceased, executed and delivered to the agents and attorneys of one John S. Barbee, or his assignee, Van Meter Terrell Feed Company, a Kentucky Corporation, a promissory note dated November 15, 1932, whereby Edward Cebrian promised to pay to John S. Barbee, or his order, the sum of $10,276.92 with interest at six per cent per annum from date until paid, payable six months after the date thereof at 200 Trust Building, Lexington, Kentucky;

5. That a full, true and correct copy of the promissory note is as follows:

$10,276.92——

San Francisco, California, November 15, 1932.

Six Months After Date, for value received, I promise to pay to the order of John S. Barbee, of Lexington, Kentucky, the sum of Ten Thousand, Two Hundred Seventy-six and 92/100 dollars ($10,276.92), with interest at the rate of six

per cent, per annum from date until paid, without defalcation, interest payable at maturity, and thereafter semi-annually until paid in full, this note negotiable and payable at 200 Trust Building, Lexington, Kentucky. The makers and endorsers of this note and all parties hereto waive presentment thereof for payment, notice of non-payment, protest and notice of protest and dishonor, and diligence in bringing suit against any and all parties hereto, including makers and endorsers, and all defenses to the payment thereof, and I guarantee payment thereof in the hands of bona fide holders.

/s/ EDWARD CEBRIAN.

6. That said promissory note dated November 15, 1932, was executed and delivered in renewal of an earlier promissory note from Edward Cebrian to John S. Barbee made in 1928 in Kentucky, which earlier note John S. Barbee had assigned to Van Meter Terrell Feed Company, a Kentucky Corporation, as collateral security for a debt owed by John S. Barbee to said corporation. Upon receipt in November, 1932, of the renewal note dated November 15, 1932, from Edward Cebrian to John S. Barbee, John S. Barbee endorsed said note in blank and delivered it to Van Meter Terrell Feed Company, a Kentucky Corporation;

7. That on or about June 6, 1945, Baylor Van-Meter sole owner of the said Van Meter Terrell Feed Company, a Kentucky Corporation, died at Lexington, Kentucky. On or about June 16, 1945, First National Bank and Trust Company of Lexington, Kentucky, was duly appointed executor of his estate, and on or about August 24, 1945, First National Bank and Trust Company of Lexington, Kentucky, was duly appointed trustee of the estate of Baylor Van-Meter, deceased;

8. That on or about May 24, 1950, said First National Bank and Trust Company of Lexington, Kentucky, delivered said note to Charles J. Colville, original plaintiff herein, and assigned to said Charles J. Colville all right, title, claim and interest it held in and to said promissory note dated November 15, 1932, from Edward Cebrian to John S. Barbee as executor or trustee of the estate of Baylor Van-Meter, deceased, or as both executor and trustee of said estate;

9. That Edward Cebrian died on or about June 6, 1944, in the County of Los Angeles, State of California;

10. That at the time of his death, Edward Cebrian owed to John S. Barbee, Van Meter Terrell Feed Company, a Kentucky Corporation, or the assignee or assignees or successors of said John S. Barbee or said Corporation, the said note dated November 15, 1932, plus simple interest from said date at six per cent (6%) per annum;

11. That the Superior Court of the State of California, in and for the City and County of San Francisco, held that Edward Cebrian was at the time of his death a resident of the City and County of San Francisco, State of California, having lived most of his life in the Cebrian family home in San Francisco, although he died in the County of Los Angeles, where he had been living for about six (6) years because of his reduced financial circumstances and because of his opportunity for employment in Los Angeles County and for other reasons;

12. That on February 9, 1945, defendant executed a petition for letters of administration in the matter of the estate of Edward Cebrian, alias, deceased, and caused said petition to be filed on February 10, 1945, in the Superior Court of the State of California, in and for the City and County of San Francisco, probate proceeding No. 98563 therein. On February 11, 1945, defendant caused notice of the hearing

of said petition for letters of administration filed in San Francisco, to be given for the time and in the manner required by law and Section 441 of the Probate Code of the State of California. In her said petition for letters of administration, defendant alleged that Edward Cebrian had died in the County of Los Angeles, State of California, but that he was at the time of his death a resident of the City and County of San Francisco, State of California;

13. That on February 20, 1945, after filing a petition for letters of administration in the Superior Court of the State of California, in and for the City and County of San Francisco, and before any hearing was had upon said petition, defendant filed a petition for letters of administration in the Superior Court of the State of California, in and for the County of Los Angeles. Defendant caused notice of the hearing of said Los Angeles petition to be given in the manner and for the time required by law and by Section 441 of the Probate Code of California. The defendant's only reason for filing said petition in Los Angeles County was to avoid delay in the event the San Francisco Superior Court should decide that Edward Cebrian was a resident of the County of Los Angeles, rather than of the City and County of San Francisco, as she alleged, and if so, it would necessarily follow that it would have decided it had no jurisdiction to appoint defendant as administratrix. In this event, defendant then could and would have proceeded with the probate proceedings instituted by her in Los Angeles County solely to meet that contingency. However, on February 26, 1945, the San Francisco Superior Court determined that Edward Cebrian was a resident of the City and County of San Francisco at the time of his death and appointed defendant as his administratrix. Accordingly, defendant abandoned the Los Angeles proceeding;

14. At no time subsequent to the death of Edward Cebrian did defendant, as an individual or as administratrix of his estate, inter-meddle with the proper probate of the estate of Edward Cebrian, deceased, either wrongfully or fraudulently;

15. That at no time subsequent to the death of Edward Cebrian, did defendant conceal, fraudulently or otherwise, the existence of the assets of the said Edward Cebrian; defendant has inventoried and accounted for all of the assets of the Edward Cebrian estate in the probate proceeding pending in the City and County of San Francisco; the allegations in the petition for letters of administration filed February 10, 1945, in the Superior Court in and for the City and County of San Francisco, as to the legal residence of Edward Cebrian at the time of his death were true and correct according to the best information and belief of defendant;

16. That no acts of defendant have deprived plaintiff, or her predecessors, of their right to file claims;

17. That on February 26, 1945, defendant, as administratrix of the estate of Edward Cebrian, alias, deceased, caused Notice to Creditors to be published in The Recorder, a newspaper of general circulation published in the City and County of San Francisco, State of California, in the matter of the estate of Edward Cebrian, alias, deceased, probate proceeding No. 98563, for the time and in the manner provided by law and Section 700 of the Probate Code of California; that the six-months period of time to file claims expired August 26, 1945; that no claim was ever filed or presented by plaintiff or any one else upon the promissory note of Edward Cebrian dated November 15, 1932, referred to in plaintiff's complaint, as required by the Probate Code of California;

18. That all of the facts alleged in plaintiff's Complaint inconsistent with the foregoing findings are untrue;

19. That all the facts alleged in defendant's Answer not inconsistent with the foregoing findings are true;

20. That no act of defendant in connection with the probate of the estate of Edward Cebrian was performed with any intent to deceive, delay, defraud, or mislead creditors of the estate of Edward Cebrian.

CONCLUSIONS OF LAW

As Conclusions of Law from the foregoing findings of fact the Court finds, as follows:

I.

That any suit or action to recover upon the promissory note dated November 15, 1932, made by Edward Cebrian in favor of John S. Barbee in the sum of $10,276.92, with interest, is forever barred by reason of the failure of the holder of said promissory note to file a creditor's claim in probate thereon within six months from the date of the first publication of Notice to Creditors on February 27, 1945, made in the matter of the estate of Edward Cebrian, alias, deceased, pending in the Superior Court of the State of California, in and for the City and County of San Francisco, probate file No. 98563 in the records thereof.

II.

That plaintiff and her predecessors in interest had constructive notice of the hearing on February 26, 1945, of the petition of defendant for letters of administration heard in the Superior Court of the State of California, in and for the City and County of San Francisco, by reason of the notice

of said hearing given by defendant in the manner and for the time required by law.

III.

That the Superior Court of the State of California, in and for the County of Los Angeles, never had or acquired jurisdiction of the matter of the estate of Edward Cebrian, alias, deceased, under the petition for letters of administration filed therein by defendant on February 20, 1945, by reason of the fact that the Superior Court of the State of California, in and for the City and County of San Francisco, in which the first petition for letters of administration was filed on February 10, 1945, had on February 26, 1945, determined that Edward Cebrian was a resident of the City and County of San Francisco, State of California, at the time of his death and that the jurisdiction to administer the estate of said decedent was in San Francisco Superior Court.

IV.

Defendant committed no fraud, extrinsic in character, with respect to the probate proceedings in the matter of the estate of Edward Cebrian, alias, deceased, either in the County of Los Angeles or the City and County of San Francisco, State of California.

V.

That plaintiff is not entitled by law or under the evidence adduced at the trial of this case to a judgment that defendant, either as administratrix of the estate of Edward Cebrian, alias, deceased, or as an individual, is a constructive trustee for plaintiff, Wilma Urch Colville.

VI.

The Court, having disposed of the case in favor of defendant by express findings of fact and conclusions of law on the issue of fraud, makes no findings of fact or conclusions of law on the issues as to the interpretation of the note in suit, the questions of conflicts of laws or the other issues raised by defendant's special defenses based upon laches and various statutes of limitation of the States of California and Kentucky.

VII.

That defendant is entitled to judgment that plaintiff take nothing by her complaint, provided, however, each party shall bear her own costs of suit. Let Judgment be entered accordingly.

Dated: February 14, 1955.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed February 14, 1955.

[Title of District Court and Cause]

JUDGMENT

This cause having come on regularly for trial on the 9th day of March, 1954, before the United States District Court, Honorable George B. Harris, District Judge, presiding, without a jury, a jury having been duly waived; Carl Hoppe, Esq., and Charles E. Townsend, Jr., Esq., appearing as attorneys for plaintiff, and Charles D. Sooy, Esq., appearing as attorney for defendant; and the Court having made its Findings of Fact and Conclusions of Law;

Now, Therefore, It Is Hereby Ordered, Adjudged, and Decreed that plaintiff take nothing by her said complaint, and

It Is Ordered further that each party bear her own costs of suit incurred herein.

Dated: February 14, 1955.

/s/ GEORGE B. HARRIS,
United States District Judge.

Receipt of copy acknowledged.

Lodged November 18, 1954.

[Endorsed]: Filed February 14, 1955.

[Title of United States Court of Appeals for the Ninth Circuit and Cause]

Before: McAllister, Pope, and Chambers, Circuit Judges.

McAllister, Circuit Judge:

OPINION

Charles J. Colville brought suit in the district court on a promissory note against Isabelle C. Koch, administratrix of the estate of Edward Cebrian, deceased. The plaintiff claimed that he had been deprived, through the fraudulent probate of the estate by Mrs. Koch in San Francisco, of the right to file his claim, and that the fraud consisted in Mrs. Koch's representation that her brother had been a resident of San Francisco at the time of his death, whereas, in reality, he had been a resident of Los Angeles; and plaintiff, accordingly, claimed that the notices for the filing of claims should have been published in Los Angeles County instead of San Francisco, thereby causing him to fail to file his claim. During the litigation, Mr. Colville died, and his wife,

Wilma Urch Colville, as his executrix, was substituted as party-plaintiff. The district court denied recovery on the note, and Mrs. Colville, as executrix, appeals.

The background of the case is as follows: On November 15, 1932, Edward Cebrian executed a promissory note in the amount of $10,276.92, with interest at 6%, payable six months thereafter, to John S. Barbee or his order, at Lexington, Kentucky. The note was headed: "San Francisco, California."

Mr. Cebrian was born in San Francisco and lived in that city most of his life. He died in Los Angeles, June 6, 1944, at the age of sixty-two. As far as the evidence in this case discloses, no one had ever made a demand for payment of the above note until the filing of this suit, November 6, 1952, nearly twenty years after its execution, and nineteen and a half years after it became due; and no interest had ever been paid upon the note.

On February 9, 1945, Isabelle C. Koch, defendant-appellee, a sister of Mr. Cebrian, filed a petition for letters of administration of his estate in the Superior Court of the State of California in and for the County of San Francisco; and on February 11, 1945, she caused notice of the hearing of the petition to be given for the time and in the manner required by law. In her petition, she alleged that Mr. Cebrian had died in the County of Los Angeles, but that, at the time of his death, he was a resident of the City and County of San Francisco. Nine days after filing her petition in San Francisco, appellee administratrix also filed a petition for letters of administration in her brother's estate in the Superior Court of the State of California in and for the County of Los Angeles, alleging that at the time of his death, he was a resident of that city, and caused notice of the hearing of the Los Angeles petition to be given in the

manner and for the time required by law. Appellee filed the second petition in Los Angeles on advice of her counsel and for the reason, as she stated, that she did not know which place the court would consider to have been the legal residence of Mr. Cebrian.

The Superior Court in San Francisco determined that Edward Cebrian had been a resident of that city at the time of his death. Appellee administratrix thereupon proceeded to the probate of his estate in San Francisco and abandoned any further proceedings in Los Angeles.

In the suit upon the note brought by appellant's decedent, it was alleged that Edward Cebrian was a resident of Los Angeles at the time of his death; that Isabelle C. Koch, administratrix of Mr. Cebrian's estate, after filing her petition for letters of administration in Los Angeles, fraudulently represented that Mr. Cebrian had been a resident of San Francisco at the time of his death; that she fraudulently filed a petition for letters of administration in that county; that she fraudulently concealed the existence of new assets in her brother's estate; that she fraudulently intermeddled with the jurisdiction of the Los Angeles Superior Court and failed to deliver to the jurisdiction of that court assets of her brother's estate coming into her possession; that she fraudulently intermeddled with the proper probate of her brother's estate and wrongfully obtained and retained possession and control of all of his property; and that, by her false representations that Edward Cebrian had been a resident of San Francisco at the time of his death, she fraudulently caused the Superior Court of San Francisco to grant letters of administration to her and deprived plaintiff's decedent of knowledge of the existence of the assets of Edward Cebrian and of his right to file his claim against the estate.

The district court found that appellee's only reason for filing the petition in Los Angeles was to avoid delay in the event that the San Francisco Superior Court should decide that Edward Cebrian was a resident of Los Angeles, rather than of San Francisco, at the time of his death; that at no time did appellee intermeddle with the proper probate of the estate of her brother, wrongfully or fraudulently, nor fraudulently conceal the existence of assets of the estate; that no acts of appellee had deprived appellant or her predecessors of their right to file claims; that the probate of the estate in San Francisco was legal and proper; that all appellant's allegations in the complaint, inconsistent with the foregoing, were untrue; that no claim was ever filed on the promissory note and that no act of appellee in connection with the probate of the estate of Edward Cebrian was done with intent to deceive, defraud, delay, or mislead creditors. As a matter of law, the district court concluded that appellant and her predecessors in interest had constructive notice of the hearing in San Francisco on appellee's petition for letters of administration; that the claim on the promissory note was forever barred for failure to file claim thereon in the probate proceedings; and that appellee had committed no fraud, extrinsic in character, with respect to the probate proceedings, either in Los Angeles or in San Francisco. The district court finally declared that, having disposed of the case in favor of appellee by express findings of fact and conclusions of law on the issue of fraud, it made no findings of fact or conclusions of law upon other issues raised by appellee in defense of the suit, including those based upon statutes of limitations, and appellant's failure to establish title to the promissory note in suit.

The judgment of the district court in this case may not be reversed unless its findings of fact were clearly erroneous,